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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**
9 **AT TACOMA**

10 DALE P. DAVIS,

11 Plaintiff,

12 v.

13 BRENDA POWERS, et al.,

Defendants.

NO. C08-5751 FDB/KLS

ORDER GRANTING DEFENDANTS'
MOTION TO AMEND ANSWER

14 Before the court is Defendants' motion for leave to amend, pursuant to Fed. R. Civ. P.
15 15(a), their answer to Plaintiff's amended civil rights complaint. Dkt. 43. Plaintiff opposes
16 the motion and seeks sanctions. Dkt. 47. Defendants filed a reply. Dkt. 48. After carefully
17 reviewing the motion and responses and balance of the record, the court finds that leave to
18 amend should be granted.

19 **DISCUSSION**

20 Plaintiff alleges generally that Defendants wrongfully punished and retaliated against
21 him for filing a complaint against them in Superior Court and complaining to his civil
22 commitment judge, by denying him use of a television ordered for him by his mother, on the
23 false pretense that a "caption device" contained in the television is not allowed in the
24 institution. Dkt. 4, pp. 5-8. Plaintiff further alleged that other residents of SCC were allowed
25 to order and receive the same television with the "caption feature". *Id.*, p. 6, ¶ 26. In
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1 paragraphs 26, 29 and 31, Plaintiff alleged that many residents at SCC owned the same
2 Sylvania flat screen TV with a “caption feature.” Dkt. 4, pp. 6-8. In response, Defendants
3 stated as follows:

4 26. Defendants admit that after Mr. Deyman informed defendant Harris that
5 the television did not conform to SCC policy regarding electronics, Ms. Harris
6 indicated that Mr. Davis would not be allowed to keep the television.
7 Defendants are without sufficient information to admit or deny whether other
8 residents have the same television and therefore deny the same.

8 29. Defendants deny that they did not follow SCC policies and procedures
9 for purchasing property at the SCC. Defendants are without sufficient
10 information to admit or deny whether other residents have the same television
11 and therefore deny the same. Defendants deny they punished or retaliated
12 against plaintiff for his bringing a motion regarding the television.

11 31. Defendants are without sufficient information to admit or deny the first
12 sentence in Paragraph 31 and therefore deny the same. Defendants deny that
13 any actions regarding plaintiff’s television were done in retaliation for plaintiff
14 having exercised his right to petition the Court regarding the television issue.

14 Dkt. 18, pp. 4-5.

15 Defendants now request leave to amend their answer as to the three allegations
16 contained in ¶¶ 26, 29 and 31, to reflect information defendants “have learned since answering
17 the complaint.” Dkt. 43, p. 2. Defendants state that their proposed amendment is not made in
18 bad faith, no delay will result as additional discovery will not be required, and that there is no
19 resulting prejudice as they are merely amending the answer to reflect the correction
20 information. *Id.*

21 Previously, on October 9, 2009, defendants requested the court to compel Mr. Davis to
22 answer interrogatories relating to the allegations contained in his complaint that other residents
23 of SCC had and were allowed to keep the same television. Dkts. 23 and 28. Defendants
24 argued that this information was critical to their ability to defend themselves because in late
25 June 2009, defendants conducted an inventory of resident televisions demonstrating that no
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1 SCC resident has the same television that is the subject of this suit. Dkt. 23. In their responses
2 to interrogatories, Defendants stated that there were no other residents at SCC possessing the
3 same TV that Plaintiff ordered and was denied. Dkt. 23-2. Defendants made similar
4 statements in their declarations and depositions. Dkts. 26, 27, 29 and 30. Defendants further
5 argued that Plaintiff should be sanctioned and prohibited from supporting his claim that others
6 have the same television. *Id.*, p. 7.

8 After Mr. Davis reviewed SCC's inventory, he found six televisions similar to the one
9 that was denied him by SCC. Plaintiff brought this to the attention of defense counsel in a
10 letter dated October 30, 2009. Dkt. 47, pp. 12-13.

11 On November 5, 2009, Defendants moved to withdraw their motion to compel, stating
12 that they "have recently been provided information that substantially changes the necessity of
13 their motion to compel." Dkt. 32. Defendants also moved to correct their reply to the motion
14 to compel (Dkt. 28) and supporting declaration of Brenda Powers (Dkt. 29), stating:

16 Subsequent to the filing of defendants' Reply to Motion to Compel (Dkt.
17 28) and the Declaration of Brenda Powers (Dkt. 29) on November 4, 2009, at
18 the request of defense counsel, Darold Weeks, SCC Chief Investigator,
19 inspected the televisions of six residents (identified pursuant to information
20 provided by plaintiff). *See* Declaration of Darold Weeks at ¶ 2. Four of these
21 residents have televisions that are identical to the television that is the subject of
22 this lawsuit (Sylvania 15" LCD television Model #LC 155SL8P). *Id.* at ¶ 3.
23 Two other residents have televisions that are of the same make and bear the
24 Model #LC 155SL8. *Id.* They are technically the same television except that
25 they have a built-in DVD player. *Id.*

26 The reply in support of defendants' motion to compel and the supporting
declaration of Brenda Powers are factually incorrect in stating that no other
residents at SCC possessed the same model television that is the subject of this
lawsuit (Dkt. ## 28, 29). The previously filed deposition of Brenda Powers is
also incorrect as to that assertion (Dkt. #26).

1 Dkt. 36, pp. 1-2. The court granted Defendants’ motion to withdraw and to correct the
2 accompanying affidavits. Dkt. 46.

3 Federal Rule of Civil Procedure 15(a) provides that leave of the court allowing a party
4 to amend its pleading “shall be freely given when justice so requires.” Leave to amend lies
5 within the sound discretion of the trial court, which discretion “must be guided by the
6 underlying purpose of Rule 15-to facilitate decisions on the merits rather than on the pleadings
7 or technicalities.” *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981). Thus, Rule 15's
8 policy of favoring amendments to pleadings should be applied with “extreme liberality.” *Id.*;
9 see also *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987).

11 Four factors are relevant to whether a motion for leave to amend should be denied:
12 undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing
13 party. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). However,
14 these factors are not of equal weight; specifically, delay alone is insufficient ground for
15 denying leave to amend. See *Webb*, 655 F.2d at 980. Futility of amendment, by contrast, can
16 alone justify the denial of a motion for leave to amend. See *Bonin v. Calderon*, 59 F.3d 815,
17 845 (9th Cir.1995). A proposed amendment is futile “if no set of facts can be proved under the
18 amendment to the pleadings that would constitute a valid and sufficient claim or defense.”
19 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.1988). In other words, if the proposed
20 amended complaint cannot withstand a motion to dismiss, it should be denied as futile. See *id.*
21 (citing 3 J. Moore, *Moore's Federal Practice* § 15.08[4] (2d ed.1974)).

24 Defendants argue that their request to amend is made “merely to correct their answer
25 since learning new information,” and that there is no bad faith, undue delay, resulting prejudice
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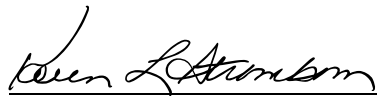
1 to plaintiff or futility. Dkt. 48, p. 2. The record reflects that the inventory on which they based
2 their sworn statements has been in their possession since June of 2009, less than a month after
3 they filed their answer. The record reflects that they were advised by Mr. Davis in October 30,
4 2009 that the inventory supported Mr. Davis's allegations because it reflected that at least six
5 residents had similar televisions. The record also reflects that on November 4, 2009, defense
6 counsel requested an inspection of the televisions belonging to the six residents identified by
7 Mr. Davis. The record is insufficiently developed however, to allow the court to discern
8 whether Defendants' previous sworn statements that their inventory contradicted Mr. Davis'
9 allegations was merely incorrect or was intended to deliberately mislead.
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11 Despite the delay between preparation of the inventory and Defendants' request to
12 amend and the unresolved question of why a later investigation revealed what previous ones
13 had not, the undersigned concludes that Defendants should be allowed to amend their answer
14 to correct their previous representations that they were "without sufficient information to admit
15 or deny" those allegations. The proposed amendment will correct the record to reflect that
16 Defendants admit that SCC allowed other residents to possess the same television. The
17 remaining issues of whether Defendants acted in retaliation by wrongfully denying Plaintiff the
18 same television or the investigation that followed may be more fully explored by the parties in
19 a dispositive motion.
20

21 Accordingly, it is **ORDERED**:

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- 23 (1) Defendants' Motion to Amend their Answer (Dkt. 43) is **GRANTED**.
 - 24 (2) Plaintiff's Motion for Sanctions (Dkt. 47) is **DENIED**.
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1 DATED this 21st day of December, 2009.

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4 Karen L. Strombom
5 United States Magistrate Judge
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